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IN THE

Supreme Court of the United States

October Term, 1966

No. 411
(Two Cases)

LINA DERRITT,

Petitioner,

vs.

STATE BOARD OF REAL ESTATE EXAMINERS,

Respondent.

BRIEF OF RESPONDENT, STATE BOARD OF REAL ESTATE EXAMINERS, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

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IN THE

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STATE BOARD OF REAL ESTATE EXAMINERS,

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BRIEF OF RESPONDENT, STATE BOARD OF REAL ESTATE EXAMINERS, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

STATEMENT

This Brief is presented in opposition to the Petition for Writ of Certiorari to the Supreme Court of Ohio by Lina Derritt, whereby she petitions this Court to review judgments of the Supreme Court of Ohio dismissing her appeal and overruling her motion to certify.

To facilitate a thorough understanding of this case, the Respondent finds it necessary generally to set forth the background facts.

These two cases originated as separate administrative hearings before the Respondent-Board. In one case, the Respondent suspended the Petitioner's real estate broker's license. In the other, the Respondent revoked the Peti-

tioner's real estate broker's license. The Petitioner appealed both of the Respondent's adjudication orders to the Court of Common Pleas of Cuyahoga County, where the Petitioner applied for and obtained orders staying execution of the Respondent's orders. The Court of Common Pleas affirmed both of the Respondent's orders and the final order so affirming in each case was journalized on *September 27, 1962*. The Court of Appeals affirmed the lower court's judgments. The Petitioner then sought review of these cases by the Supreme Court of Ohio. The Supreme Court of Ohio dismissed them on the grounds that no substantial constitutional question was involved, and subsequently denied the Petitioner's request for a rehearing. The Petitioner then filed with this Court a petition for writ of certiorari. This Court denied certiorari. *Derritt v. State Board of Real Estate Examiners*, 377 U.S. 1006 (1964).

In August and September of *1964*, the Petitioner filed petitions for new trials in the Court of Common Pleas of Cuyahoga County in each of the original cases. The Respondent filed motions to strike these pleadings from the files, which motions were granted. The orders of the Court of Common Pleas granting the motions to strike were affirmed by the Court of Appeals. The Petitioner appealed the Court of Appeals' judgments to the Supreme Court of Ohio, in a consolidated case under the Supreme Court of Ohio's No.'s 39999 - 40000. The Supreme Court of Ohio dismissed the Petitioner's appeal and overruled her motion to certify. It is on the basis of these judgments that the Petitioner seeks to invoke the jurisdiction of this Court.

It shall be the purpose of this Brief to demonstrate that no federal question was before the Supreme Court of Ohio, and none was decided. As a consequence, the Petition is

without merit, as it raises no basis upon which to invoke this Court's jurisdiction and therefore should be dismissed.

ARGUMENT

First, the Petition should be dismissed because the Petitioner did not *present* a federal question to the Supreme Court of Ohio for its determination.

Petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C. §1257 (3), which reads in pertinent part:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> "* * * * * * * * *
>
> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, *or where any title, right, privilege or immunity is specially set up or claimed under the Constitution*, treaties or statutes of, or commission held or authority exercised under, the United States."
>
> (Emphasis added.)

It is clear that in the instant case the Petitioner is attempting to utilize the italicized portion of 28 U.S.C., *supra*. Equally clear is the fact that to so invoke the jurisdiction of this Court, in a case sought to be reviewed a petitioner must have specially set up or claimed a right, title, privilege or immunity under the Constitution of the United States (hereinafter referred to as "federal question") in the highest court of a state, for without such specific claim this Court lacks jurisdiction.

The Petitioner presented no federal question to the Supreme Court of Ohio, or for that matter, to any of the lower Ohio courts. This lack of presentation of a federal question to the Supreme Court of Ohio is made patently

obvious by a review of the "Memorandum In Support of Jurisdiction" that the Petitioner filed in the Supreme Court of Ohio, which is appended hereto and comprises Appendix A. It should be noted that a copy of said "Memorandum In Support of Jurisdiction" was certified to this Court by the Supreme Court of Ohio with the record in this case. A review of the memorandum (App. A) reveals that the *only* mention of a constitution is in the Plaintiff-Appellant's (Petitioner here) "Notice of Appeal" which was filed in each of the Ohio Court of Appeals' actions. (App. A pp. 3a, 5a). Nowhere in the memorandum before the Supreme Court of Ohio did the Petitioner specifically set out or even allude to a constitutional question or argument. In fact, a most searching examination of Appendix A will not even inferentially indicate whether the Petitioner was attempting to there present the "due process of law" argument she now advances, and if so whether it was the due process clause in the Ohio Constitution or the Constitution of the United States. The Ohio Constitution also provides for "due process of law." See, *City of Akron v. Chapman*, 160 Ohio St. 382, 385 (1953). In any event, the "Memorandum In Support of Jurisdiction" (App. A) filed by the Petitioner with the Supreme Court of Ohio belies any contention here that she presented to that court a federal question.

This Court has been clear in its requirement that before the jurisdiction of the Court can be invoked as herein prayed, a federal question must have been *presented* to the highest state court. Indicative of this requirement is the case of *Southwestern Bell Telephone Co. v. Oklahoma*, 303 U.S. 206 (1938), where the Court stated at pages 212-213:

> "We have repeatedly held that *it is essential to the jurisdiction of this Court* in reviewing a decision of a court of a State *that it must appear affirmatively*

> *from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause*; that the federal question was actually decided or that the judgment as rendered could not have been given without deciding it. * * *" (Emphasis added.)

There are a plethora of decisions of this Court stating the above principle. See, *e.g., Honeyman v. Hanan*, 300 U.S. 14, 18 (1937); *Lynch v. New York ex rel. Pierson*, 293 U.S. 52, 54 (1934); *Walter A. Wood Mowing & Reaping Machine Co. v. Skinner*, 139 U.S. 293, 295 (1891).

The two cases cited by the Petitioner (Petition p. 5), are clearly distinguishable from the instant case in that in each of these cases the federal question was indisputably presented to the state court. *Broad River Power Co. v. South Carolina*, 281 U.S. 537, 539 (1930); *Norris v. Alabama*, 294 U.S. 587, 588-89 (1935).

Petitioner has made no showing that she presented a federal question to the Supreme Court of Ohio and it is apparent that no federal question was presented to that court. Consequently, this Court should deny certiorari.

> "* * * *This Court is always wary of assuming jurisdiction of a case from a state court unless it is plain that a federal question is necessarily presented, and the party seeking review here must show that we have jurisdiction of the case.* * *" *Department of Mental Hygiene of California v. Kirchner*, 380 U.S. 194, 197 (1965). (Emphasis added.)

Second, even making the wholly unsupportable assumption that a federal question was presented to the Supreme Court of Ohio, that court did not *decide* a federal question nor was the determination of a federal question necessary to make the judgments in this cause rendered by that court.

Attention of this Court is invited to the authorities previously cited which state that it is essential to this Court's jurisdiction not only that a federal question be presented to the highest court of the state having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause; in other words, that the state court actually decided the federal question, or that the judgment could not have been given without deciding it. *Southwestern Bell Telephone Co. v. Oklahoma, supra*; *Honeyman v. Hanan, supra*; *Lynch v. New York ex rel. Pierson, supra*; *Walter A. Wood Mowing & Reaping Co. v. Skinner, supra.* Nothing in the record indicates that the Supreme Court of Ohio did decide a federal question. How could it decide a federal question when none was presented to it?

The sweeping statement by Petitioner that federal questions were decided by the Supreme Court of Ohio, and the statement that the federal questions decided by that court were in conflict with decisions of other courts, including this one, (Petition p. 3) are completely unsupported by the citation of any facts, the record or the assertedly conflicting decisions. This contention by the Petitioner is in fact without foundation.

The Supreme Court of Ohio's judgments in this case are fully supportable on non-federal grounds. Section 2321.21, Ohio Revised Code, provides as follows:

> "*Application may be made after term.* (GC §11580)
>
> "When, with reasonable diligence, the grounds for a new trial could not be discovered before but are discovered after the term at which the *journal entry* of a final order, judgment, or decree has been approved by the trial court in writing and *filed with the clerk of the court for journalization, the application for a new trial may be by petition, filed not later than the second*

> *term after the discovery,*[1] *nor more than one year after the final order, judgment, or decree was rendered,* on which a summons must issue, be returnable, and be served, or publication made, as in other cases."
>
> (Emphasis added.)

As previously stated, the final orders of the Court of Common Pleas of Cuyahoga County affirming the orders of the Respondent were each journalized on September 27, 1962. The Petitioner did not make her motions for new trials in said Court of Common Pleas until August and September of 1964. Thus, these motions for new trials were clearly not filed within one year after journalization as required by Section 2321.21, *supra.*[2] Since the motions for new trials were clearly outside the ambit of the statute, Respondent's motions to strike these petitions from the files were proper, as is succinctly pointed out in the case of *Black v. Goodman*, 12 Ohio C.C.R. (n.s.) 287 (Cir. Ct. Hamilton Co. 1909), where the court states at page 288:

> "The office of a motion to strike a pleading from the files is to test the regularity connected with the filing, *as when filed after the time allowed by statute*, or the form of such pleadings as when not verified, its office is not to inquire into the merits of the case either in law or in fact. * * *" (Emphasis added.)

It should be noted that the Petitioner's statement that there is no provision in the code for the filing and consideration of a "Motion to Strike the Petition from the Files" (Petition p. 4) is clearly erroneous.[3]

[1] Since the Court of Common Pleas is required by Section 2301.05, Ohio Revised Code, to hold at least three terms in the county each year, this aspect of Section 2321.21, *supra*, need not be considered.

[2] In a case such as the instant one, where the party seeking the new trial under Section 2321.21, *supra*, lost at the trial court level and the trial court's judgment was affirmed on appeal(s), the one year provision of the statute begins to run upon journalization of the trial court's judgment. *Varner v. Eppley*, 30 Ohio N.P. (n.s.) 531 (Ct. Com. Pl. 1933).

[3] Section 2309.70, Ohio Revised Code, provides: "Motions to strike pleadings and papers from the files may be made with or without notice, as the court directs."

From the foregoing analysis of the Ohio law it is evident that the Supreme Court of Ohio had ample basis to decide this case solely on the grounds of state law. The Petitioner has entirely failed to demonstrate to this Court that the Supreme Court of Ohio decided this case on other than non-federal grounds. In the case of *Durley v. Mayo*, 351 U.S. 277 (1956), this Court made the following pronouncement at page 281:

> "* * * [P]etitioner, in order to establish our jurisdiction, must demonstrate that neither of these state grounds can account for the decision below. 'Where the highest court of the state delivers no opinion and it appears that the judgment *might* have rested upon a non-federal ground, this Court will not take jurisdiction to review the judgment.' *Stembridge v. Georgia*, 343 U.S. 541, 547." (Emphasis the Court's.)

Petitioner has failed to show to this Court that the Supreme Court of Ohio *decided* a federal question. In addition, the Petitioner has failed to show to this Court that the judgments of the Supreme Court of Ohio could not have rested on non-federal grounds, thereby necessitating decision of a federal question to render the judgments it did. Consequently, this Court should deny certiorari.

For each and all of the foregoing reasons, it is respectfully submitted that the Petition presents no basis upon which to invoke this Court's jurisdiction. Therefore, the Petition should be dismissed and certiorari denied.

Respectfully submitted,
WILLIAM B. SAXBE,
Attorney General of Ohio
GERALD A. DONAHUE,
First Assistant Attorney General of Ohio
State House Annex,
Columbus, Ohio 43215

September, 1966.

APPENDIX A.

"Memorandum in support of jurisdiction," filed by the Petitioner herein in the Supreme Court of Ohio Case No's. 39,999, and 40,000.

Nos. ..... and .....

In the Supreme Court of Ohio

APPEALS FROM THE COURT OF APPEALS OF THE EIGHTH JUDICIAL DISTRICT.

LINA DERRITT,
Plaintiff-Appellant,

v.

STATE BOARD OF REAL ESTATE EXAMINERS,
Defendant-Appellee.

MEMORANDUM IN SUPPORT OF JURISDICTION.

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Case No. 27,271.

In the Court of Appeals

EIGHTH JUDICIAL DISTRICT OF OHIO

(Franklin.)

LINA DERRITT,
Plaintiff-Appellant,

v.

STATE BOARD OF REAL ESTATE EXAMINERS,
Defendant-Appellee.

NOTICE OF APPEAL.

(Filed in Court of Appeals December 27, 1965.)

Plaintiff-Appellant hereby gives notice of her appeal to the Supreme Court of Ohio:

(A) From the judgment and final order rendered herein on the 8th day of December, 1965.

(B) This case originated before the State Board of Real Estate Examiners.

(C) This case involves a substantial Constitutional question.

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241-1835,
Attorneys for Plaintiff-Appellant.

Certificate of Service.

Copy of the foregoing Notice of Appeal received this .... day of December, 1965.

WILLIAM B. SAXBE,
Attorney General of Ohio,
By .....
Assistant Attorney General.

Case No. 27,272.

In the Court of Appeals

EIGHTH JUDICIAL DISTRICT OF OHIO

(Keeling.)

LINA DERRITT,
Plaintiff-Appellant,

v.

STATE BOARD OF REAL ESTATE EXAMINERS,
Defendant-Appellee.

NOTICE OF APPEAL.

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WILLIAM B. SAXBE,
Attorney General of Ohio,
By .....
Assistant Attorney General.

Nos. ..... and .....

In the Supreme Court of Ohio

APPEALS FROM THE COURT OF APPEALS OF THE EIGHTH JUDICIAL DISTRICT.

LINA DERRITT,
Plaintiff-Appellant,

v.

STATE BOARD OF REAL ESTATE EXAMINERS,
(Ohio Real Estate Commission),
Defendant-Appellee.

MEMORANDUM IN SUPPORT OF JURISDICTION.

STATEMENT OF FACTS.

With the court's permission, the plaintiff-appellant will be referred to as the plaintiff, and the defendant-appellee, as the defendant.

The plaintiff in this case (after term) filed a petition for a new trial and summons thereon was served upon the defendant. Thereafter, the defendant filed a motion to strike from the files, the petition for a new trial. The motion to strike was based upon the following grounds:

> "That the plaintiff had not brought herself within any of the provisions which authorize this court to grant a new trial."

The Common Pleas Court sustained the motion to strike the petition for a new trial from the files, the Court of Appeals affirmed the Common Pleas Court and this appeal is taken from that ruling.

ARGUMENT.

The Court Erred in Sustaining the Motion of the Defendant to Strike the Petition For a New Trial From the Files.

Section 2321.21 Rev. Code provides for the filing of a petition for new trial after term.

Section 2321.22 Rev. Code then sets forth the manner in which the petition is to be considered and the case heard and decided. It is as follows:

> "2321.22 *Facts in petition considered and case heard and decided.*
>
> The facts stated in the petition mentioned in Section 2321.21 of the Revised Code, shall be considered as denied, without answer. If the service is complete in vacation, the case shall be heard and summarily decided at the ensuing term, and when completed in term, within twenty days after service. The case shall be placed on the trial docket, and witnesses examined in open court, or their depositions taken as in other cases."

The filing of a petition for a new trial, the pleadings necessary to make up the issues, the procedure for hearing and disposition thereon, are purely statutory and are contained in Sections 2321.21 and 2321.22 Revised Code. There is no provision in the code for the filing, or even the consideration of a "Motion to Strike the Petition from the Files," as was done in this case, and the court was clearly acting beyond its authority in doing so.

The statute clearly states that the petition shall be considered *as denied without answer* and further provides that it *must be heard* within a specified time.

Section 2321.22 is a "Special Proceeding" relating to a Petition for a new trial and must be followed *to the exclusion of any general provisions of the Revised Code relating to procedure.*

Section 1.12 Rev. Code provides:

> "When a special provision is made in a remedial law as to service, pleadings, competency of witnesses, or in any other respect inconsistent with the general provisions of sections of the Revised Code relating to procedure in the court of common pleas and procedure on appeal, the special provision shall govern, unless it appears that the provisions are cumulative."

The "Special Proceedings" outlined by the Code (Sections 2321.21 and 2321.22) relating to a Petition for new trial after term provide for:

1. The filing of a Petition.
2. Issurance of a summons thereon.
3. Allegations of Petition denied *without answer.*
4. Time of hearing.
5. Placing case on trial docket.
6. Examination of witnesses in open court, or by deposition.

There is absolutely no provision for the filing or consideration of motions, demurrers or any other pleading and under the clear provisions of Section 1.12 Revised Code, the court was without authority to entertain, hear and rule on a motion to strike the petition. The court was entirely without jurisdiction to act as it did, and consequently, its action was null and void.

It is respectfully submitted that the order of the common pleas court sustaining the motion to strike and order-

ing the Petition for new trial stricken from the files, should be reversed and the common pleas court directed to hear the matter on its merits, as provided in Section 2321.22 Revised Code.

Respectfuly submitted,
JOHN G. PEGG,
JOHN H. BUSTAMANTE,
Attorneys for Plaintiff-Appellant.

APPENDIX "A."

Journal Entry, Common Pleas Court.

(November 30, 1964.)

To Court

It is ordered that Appellee's motion is granted and Appellant's petition for a new trial is stricken from the files. Costs affixed against Appellant and exceptions are reserved. (Civil Journal 364, page 1196.)

APPENDIX "B."

Journal Entry, Court of Appeals.

(Like Entries filed December 8, 1965 in Court of Appeals Nos. 27,271 and 27,272.)

This cause came on to be heard upon the Appeal on questions of law from the judgment of the Cuyahoga County Court of Common Pleas, and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and, therefore, the judgment of the Common Pleas Court is affirmed, and it is ordered that appellee recover of appellant its costs herein taxed.

The Court finds that there was reasonable grounds for this Appeal.

It is ordered that a special Mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution.

To all of which appellant, by her counsel, excepts.

APPENDIX "C."

Section 2321.22 of the Revised Code of Ohio.

"The facts stated in the petition mentioned in Section 2321.21 of the Revised Code, shall be considered as denied, without answer. If the service is complete in vacation, the case shall be heard and summarily decided at the ensuing term, and when completed in term, within twenty days after service. The case shall be placed on the Trial Docket and the witnesses examined in open court, or their depositions taken as in other cases."

APPENDIX "D."

Section 1.12 of the Revised Code of Ohio.

"When a special provision is made in a remedial law as to service, pleadings, competency of witnesses, or any other respect inconsistent with the provisions of the sections of the Revised Code relating to procedure in the Court of Common Pleas and procedure on appeal, the special provisions shall govern, unless it appears that the provisions are cumulative."